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To Obey or Not to Obey, That Is the Question - A Study of Article 90 - A Future Action Area of the Uniform Code of Military Justice

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TO OBEY OR NOT TO OBEY, THAT IS THE QUESTION!

A STUDY OF ARTICLE 90—A FUTURE ACTION AREA OF THE UNIFORM CODE OF MILITARY JUSTICE.

BY

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WE ARE LIVING in a time whose ethos has precious little regard for order and discipline. Consequently, the role traditionally fulfilled by military officers has become increasingly more difficult. Indeed, recent experiences in Vietnam and elsewhere have taught that young men entering on active duty in the Armed Services are resistant to authority. Rather than unquestioningly following instructions, they seek to satisfy themselves that the orders of their superior officers are something more than the insensate expression of naked authority.

What this attitude betokens for the future is beyond the purview of this article. Rather, we shall attempt to explore one of the more significant sanctions that may be employed against a recalcitrant soldier, namely Article 90 of the Uniform Code of Military Justice. Such a study seems singularly appropriate, for in view of the contemporary disdain for order and discipline, Article 90 promises to play an increasingly important role in military affairs.

There is no offense more unique to the military than that defined by Article 90 of the Uniform Code of Military Justice as "willful disobedience." The salient elements of the offense are: (1) willful disobedience of (2) a lawful command of (3) a superior commissioned officer in the execution of his office.

The purpose of Article 90 is to preserve the ability of the military to respond swiftly and efficiently in its mission. In 1920, Colonel Winthrop wrote that "[o]bedience to orders is the vital principle of the military life—the fundamental rule, in peace and in war, for all . . . from the general of the army to the newest recruit."[1] Without

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1. WINTHROP, MILITARY LAW AND PRECEDENTS 571 (2d Ed. 1920).

prompt obedience to orders, the military would dissolve into an armed mob, subject to the whims and will of each trooper.[2]

Willful disobedience is described in the Manual for Courts-Martial as that which:

> [s]hows an intentional defiance of authority, as when an enlisted listed person is given a lawful command by a commissioned officer to do or cease doing a particular thing at once and refused or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this article but may be an offense under Article 92.[3]

Since the Uniform Code of Military Justice is "not dissimilar to a civilian criminal code,"[4] it is not surprising that the concept of *mens rea*, as that term is used in its broadest sense, plays as important a role in the military system of criminal justice as it does in the civilian system. Thus, just as with those "intentional" civilian crimes which require willfulness, the offense of willful disobedience requires that the proscribed behavior be done intentionally.[5]

DEMEANOR AND REASONABLENESS

It is vital to remember that the demeanor of the defendant is never an issue in willful disobedience cases. Thus, "[w]illful disobedience of an order constitutes such behavior regardless of whether it is accompanied by an arrogant manner or is attended by the most respectful demeanor."[6] Nor does the reasonableness of the order play a role in reviewing convictions for Willful Disobedience. In *United States v. Hix*,[7] a Marine was ordered into the field in December for maneuvers "immediately". However, he had not been issued the proper winter

2. The U.C.M.J. has another article to punish the disobedience of orders, Article 92, which prohibits mere disobedience of regulations and other lawful orders, but the stiffest penalties are provided for the willful disobedience offenses because of the grave threat face-to-face insubordination poses to the military system. Willfully disobeying a superior commissioned officer while in the execution of his office (Article 90) is punishable by imprisonment at hard labor for 5 years, dishonorable discharge, and forfeiture of all pay and allowances. On the other hand, merely disobeying the same officer without the element of willfulness reduces the offense to knowingly failing to obey a lawful order (Art. 92), and is punishable by only 6 months imprisonment at hard labor, the less severe bad conduct discharge, and forfeiture of pay and allowances. MANUAL FOR COURTS-MARTIAL (Rev. 1969) ¶ 127c, TABLE OF MAXIMUM PUNISHMENTS [hereinafter cited as MCM].

3. MCM (Rev. 1969), ¶ 169b.

4. M.I. SPAK, CASES AND MATERIALS ON MILITARY LAW, 1-581 (Nexus 1972).

5. Clearly, the willful nature of the disobedience is its most distinguishing characteristic, and this article shall confine itself to an exposition on "willfulness."

6. United States v. Ferenczi, 10 USCMA 3, 7; 27 CMR 77, 81 (1958).

7. 28 CMR 623 (NBR 1959).

gear. Notwithstanding the fact that he did not feel that he had done anything wrong in refusing to obey such an unreasonable order, he was convicted of willful disobedience.

Mistake of Fact:

Acting under an honest mistake of fact negates willfulness. Examples of mistakes of fact have occurred when a soldier believed that he was improperly enlisted in the Army, and incident to his attempts to secure discharge he disobeyed an order, reasonably believing he was not really in the Army;[8] where a guard refused an order to hand his rifle to his sergeant, reasonably believing that a guard should never surrender his rifle while on duty;[9] and when the accused refused to obey an order to sign a receipt of vacation of punishment under Article 15 UCMJ, believing that he was being ordered to accept more punishment. In these instances, it has been held that the accused lacked the intent to disobey wilfully because he was acting under reasonable and honest mistake of fact.

Mental Defects or Lack of Understanding:

The inability to form the requisite specific intent to disobey willfully may be a defense. Soldier with a GT score of 10 was ordered to "get his gear" and accompany a combat mission. His low level of intelligence prevented his clear understanding of the command.[10] In this case, the Army Court of Military Review held that the evidence was insufficient to show willful disobedience.[11] Similarly, a stockade

8. United States v. Pendergrass, 17 USCMA 391, 38 C.R. 189 (1968).
9. United States v. Klein, 42 CMR 671 (ACMR 1970).
10. United States v. Brewington, 44 CMR 847 (ACMR 1971).
11. It would be a mistake to conclude from *Brewington* that a low GT (or I.Q.) score, *ex proprio vigore*, precludes an individual from being able to comprehend an order from a superior officer. Indeed, the premise on which all men who pass the entrance requirements are inducted is that they possess the requisite mental acumen to enable them to function intelligently in a military setting.

Further, an analogy may be drawn between ability to comprehend orders and ability to waive one's constitutional rights. Courts, both state and federal, have continuously held that individuals of subnormal mentality do not necessarily lack the capacity to understand their rights and to waive them voluntarily and intelligently. *See e.g.*, People v. Lara, 67 Col. 2d 365, *cert. denied*, 392 U.S. 945 (1968) (minor defendant with I.Q. of 65-71 was found capable of understanding *and* waiving constitutional rights); State v. Ordog, 45 N.J. 347, 212 A.2d 370 (1965), *cert. denied*, 384 U.S. 1022 (1966) (19 year old defendant with I.Q. equivalent of a 7 year old who suffered from schizophrenia); State v. Faught, 254 Iowa 1124, 120 N.W.2d 426 (1953) (17 year old retarded epileptic); Michaud v. State, 161 Me. 517, 215 A.2d 87 (1965) (15 year old illiterate defendant with a mental age of 12); State v. Watson, 114 Vt. 543, 49 A.2d 174 (1946) (20 year old defendant with a mental age of 8); Common-

prisoner who had just been inducted into the Army was ordered to "be at ease", but since he did not know what the order meant, he continued to talk. This was held not to be disobedience.[12] Although the case was decided under Article 92, (failure to obey lawful order), the same principles apply *mutatis mutandis.*

Intoxication:

Willful disobedience requires that the defendant intentionally disobey the order of a superior commissioned officer. When the accused is intoxicated, however, he may not be able to recognize the status of the person giving the order. In such a case, the disobedience is not willful within the meaning of Article 90.[13]

Physical Impossibility:

Physical impossibility, an affirmative defense, negates the element of willfulness. For example, if a soldier were locked in a room, yet telephonically given an order to report to another place, failure to obey the order would be defendable because of physical impossibility.[14] Insofar as physical condition is concerned, it should be noted that to rise to the status of a defense the physical defect must be the proximate cause of the disobedience. For example, take the case of a soldier suffering from narcolepsy, a condition which causes drowsiness and immediate sleep at any time during the day or night. If he is ordered to perform a duty but falls asleep before he can execute it, the question

wealth v. Krzesniak, 180 Pa. Super. 560, 119 A.2d 617 (1956) (19 year old with mental age of 9).

Cases such as Haley v. Ohio, 332 U.S. 596 (1948); Culombe v. Connecticut, 367 U.S. 586 (1961); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958) are not to the contrary. In each of these, the Court underscored the atmosphere of coercion and overreaching which pervaded the lengthy custodial interrogations. In none of these cases, is there the slightest indication that subnormal intelligence, standing alone, is a bar to rational comprehension.

Compare, In re Watson, 450 Pa. 861 (1973) (14 year old illegitimate mother able to intelligently waive parental rights).

12. United States v. Rose, 40 CMR 591 (ACMR 1969).

13. United States v. Simmons, 1 USCMA 691, 5 CMR 119 (1952); United States v. Joyner, 6 CMR 854 (AFBR 1953); United States v. Miller, 2 USCMA 194, 7 CMR 70 (1953); and United States v. Oisten, 13 USCMA 656, 33 CMR 188 (1963). See also WINTHROP, MILITARY LAW AND PRECEDENTS (2d Ed. 1920).

14. It has become a commonplace that "[t]he law never requires an idle thing to be done." Insurance Co. v. Dutcher, 95 U.S. (5 Otto) 269, 272 (1877). *See also,* Kiger v. United States, 417 F.2d 1194, 1196 (7th Cir. 1969), *cert. denied,* 397 U.S. 1066 (1970). United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965), *cert. denied,* 381 U.S. 935 (1965); Santos v. United States, 417 F.2d 340, 345 (7th Cir. 1969), *rev'd on other grounds,* 397 U.S. 46 (1970); United States *ex rel.* Brooks v. McMann, 408 F.2d 823, 825 (2d Cir. 1969).

of physical impossibility is raised, because the individual made no conscious decision in the matter. The only point left to consider is whether or not the physical defect was the proximate cause of the disobedience.[15]

Physical Inability—The Reasonableness Test:

Correctly distinguishing between motivation and intent,[16] the court in *United States v. Ferenczi*,[17] noted that motivation, not itself amounting to a defense, is of no moment in reviewing willful disobedience cases. However, the military courts have created an apparent exception to those cases where a soldier refuses to obey an order because of a physical ailment even though the ailment is not so debilitating that it would support a defense of physical impossibility. A review of the cases reveals situations in which a soldier with an injured hand was ordered to tie sandbags;[18] a soldier with frostbitten feet was ordered to march;[19] a soldier with a bad back was ordered to perform KP;[20] a soldier with a backache was ordered into infantry combat;[21] and a soldier with chest pains was ordered to go on an airmobile operation.[22] In each of these cases, the individual was suffering from a physical disability which would have made compliance with the order either exceptionally difficult or painful.

In some of these cases, the task to be performed was routine, and someone else easily could have been found to replace the injured soldier. However, it would be a mistake to conclude that the decision turned on such fortuities. For, in other instances, either the accused was the only one who could have performed the task properly or the exigencies of the moment required prompt compliance. There seems to be no articulable and easily applicable standard running through these cases. Rather the decisions are very much *ad hoc* and episodic. In the final analysis, the courts appear to be saying that it is "unfair" to convict an otherwise earnest and obedient soldier for noncompliance resulting from some physical ailment. Accordingly, a test of reasonableness is employed, and the court martial must balance the fact and

15. United States v. Cooley, 16 USCMA 24, 36 CMR 180 (1966).
16. *Compare*, United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971).
17. *Supra* note 6.
18. United States v. Heims, 3 USCMA 418, 12 CMR 174 (1953).
19. United States v. King, 5 USCMA 3, 17 CMR 3 (1954).
20. United States v. Hill, 5 CMR 788 (AFBR 1952).
21. United States v. Thomas, 38 CMR 595 (ABR 1967).
22. United States v. Tolle, 39 CMR 297 (ABR 1968).

extent of the injury with the nature of the task imposed.[23] In sum, the totality of circumstances is examined.

Reasonableness of Delay:

The time element in willful disobedience cases is illustrated in the Manual by the example of a superior ordering a subordinate to do something at once. An unmentioned problem arises, however, when the subordinate has a good reason for not performing the order immediately and tries to explain the situation to the superior. Technically, the subordinate has willfully disobeyed the order to do something "at once," and may be prosecuted under the appropriate article. However, to avoid the harsh results which would result from the application of a Proscrustean rule, a rule of reason has been adopted. Under this more flexible approach, a subordinate, time and conditions permitting, may explain his situation to the superior without being willfully disobedient.[24]

This rule does not diminish the vitality of the principle that a subordinate is not permitted to question the order of a superior or to substitute his own judgment for that of the superior.[25] The privilege of explanation is allowed only where immediate compliance is not reasonably necessary, and the subordinate has a compelling reason for clarification of his position. For example, the cases on physical inability, discussed earlier, fit into this category.

One of the fountainhead cases in this area involved a soldier who refused to obey an order of a superior non-commissioned officer because he was acting under a prior order which was inconsistent with that given him by the NCO. The officer refused to allow the soldier to explain his position and attempted to have him court-martialed for willful disobedience. Since the facts showed no necessity for haste in obedience and a compelling reason for disobedience, the Board of Review quite properly reversed the conviction.[26]

Religious and Moral Beliefs:

The Manual states that "[t]he fact that obedience to a command would involve a violation of the religious scruples of the accused is not

23. *Id.*

24. "Imperative direction demands instant obedience, but there are some circumstances where an explanation should be taken into account and, time allowing, should be listened to." United States v. Hill, 5 CMR 788, 791 (AFBR 1952).

25. United States v. Cunningham, 2 CMR 466 (ABR 1951).

26. United States v. Ashley, 8 CMR 810 (ABFR 1953).

a defense."[27] Notwithstanding the peremptory clarity of the provision, defendants have attempted to raise their obedience to religious and moral beliefs as defenses to charges of willful disobedience. Underlying such claims is the notion that the defendant did not have the specific intent to disobey because he did not want to defy authority; rather, he wanted only to pursue his religion. For example, servicemen who had recently joined religious sects such as Jehovah's Witnesses,[28] the Apostolic Faith,[29] and the Radio Church of God,[30] refused to obey orders on the grounds that their religion forbade the performance of the ordered duties, which ranged from receiving an injection to cooking meals for a ship's crew.

The legal sophistry masking these arguments has been noted by the military courts which are unanimous in their refusal to recognize religious compulsion as a defense to willful disobedience. One line of reasoning states that "willful" means self-determined, voluntary, and intentional, and since the accused consciously refused to obey the order, he is guilty of willful disobedience.

A more realistic and enlightened rationale in such cases centers around the balancing approach; that is, the individual's first amendment right to freedom of religion is weighed against the military's interest in prompt obedience. The prevailing opinion is that allowing disobedience on religious grounds "[w]ould be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[31] Since that kind of situation would be intolerable to the military and to the strong national interests it protects, the claims based on freedom of religion are sublimated.

Another issue in the first amendment controversey is whether the right to religious beliefs is in fact curtailed by the military. Once again, the decision is in favor of the military, the reasoning being that the soldier's choice of religion remains inviolate but his conduct in exercise of religion remains subject to regulation for the good of society.[32]

The Vietnam War has spawned a new type of attempted defense to willful disobedience—the pacifist defense. In *United States v.*

27. MCM (Rev. 1969) ¶ 169b.
28. United States v. Cupp, 24 CMR 565 (AFBR 1957).
29. United States v. Chadwell, 36 CMR 741 (NBR 1965).
30. United States v. Burry, 36 CMR 829 (CGBR 1966).
31. United States v. Cullen, *supra*, note 16, 454 F.2d at 392, n.16 (quoting Reynolds v. U.S., 98 U.S. 145, 167 (1878)).
32. *Compare*, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Cleveland v. United States, 329 U.S. 14 (1946).

Levy,[33] an Army doctor refused to instruct special forces troops in the art of dermatology because *he* felt that the performance of such duties was inconsistent with *his* code of medical ethics. Similarly, in *United States v. Noyd*,[34] a pilot refused to give flight lessons because *he* felt that the war in Vietnam was an unjust war, and *he* could not fight in such a war because of *his* belief. In these and other cases that have touched upon the subject, disobedience to orders has not been excused by the accused's personal religious or moral beliefs.[35]

In Futuro Orders:

The Manual provides: "If the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under Article 90, although carrying out that intention may be."[36] An intent to disobey an *in futuro* order at the time of the issuance of the order is not a violation of Article 90 because the order has not been actually disobeyed at that time.[37] Therefore, if, in response to an order to report somewhere in one hour, the soldier says "I refuse to report to the building," the order has not yet been disobeyed.[38] Should the soldier subsequently fail to obey the order, the intent and the disobedience merge at the time appointed for obedience of the order, to become the offense willful disobedience.[39] The offense committed at the time of the oral refusal is insubordination[40] or disrespect to superior commissioned officer.[41]

The typical *in futuro* order to report to a certain building in an hour poses no real analytical problem. However, the problem can be complicated somewhat by the introduction of additional facts which bring the order away from *in futuro* and toward that type of order

33. 39 CMR 672 (ABR 1968) (subsequent court opinions in this case concern other elements).

34. 39 CMR 937 (AFBR 1968), *see* note 29 *supra*.

35. Service regulations concerning conscientious objectors make certain types of orders relating to duties inconsistent with the soldier's beliefs illegal so the objector is not subject to punishment while his application for conscientious objector status is pending. The greater part of *United States v. Noyd* and other cases of this type deal with soldiers whose applications were denied and who nevertheless refused to obey orders inconsistent with their beliefs.

36. MCM (Rev. 1969), ¶ 169b.

37. *Compare*, United States v. Cefalu, 338 F.2d 582 (7th Cir. 1964) (act of registering as a gambler is merely a statement of future intent and is not itself an act which promotes or otherwise facilitates gambling. Therefore, the mere act of registering does not complete crime defined in 18 U.S.C. § 1952).

38. United States v. Shivers, 42 CMR 533 (ACMR 1970).

39. United States v. Williams, 18 USCMA 78, 39 CMR 78 (1968).

40. U.C.M.J., ARTICLE 134; United States v. Principe, 4 CMR 380 (ABR 1952).

41. U.C.M.J., ARTICLE 89.

which demands immediate compliance. For example, if in the hypothetical discussed above, the building was on the other side of the post and the only way to get there on time would be to be on the bus that was leaving immediately from where he was standing, the apparent *in futuro* order demanded immediate compliance by boarding the bus. Hence, a willful failure to board the bus would constitute willful disobedience of the order to report to the building.[42]

The leading case in this field is *United States v. Stout.*[43] There, a soldier was ordered to go on patrol in the future, and he refused the order when it was given. In such a case, the order to go on patrol necessarily meant to start preparations at that time, such as drawing ammunition and getting his equipment in order, so he would be ready to leave on patrol at the appointed time. Since the order, as interpreted, demanded instant compliance, the accused's refusal constituted willful disobedience.

Steady Compliance:

Closely related to those *in futuro* orders which actually call for immediate compliance are those orders which require continuing compliance. Even the most superficial examination of the cases in this area reveals a most confused and uncertain pattern. As with the cases involving physical disability, the judgments in this area are *ad hoc* and episodic, and it is difficult to define any unifying or vivifying principle. Indeed, even where almost wholly congruent factual patterns have been presented, the results have not been uniform.[44]

The anomolous rule which seems to emerge is that if a soldier is ordered to perform a duty by a superior officer, and the soldier commences performance but fails to complete the task, the failure to perform the task does not constitute *willful* disobedience because the soldier did not *intentionally* disobey *at the instant the command was*

42. *See* United States v. Vansant, 3 USCMA 30, 11 CMR 30 (1953).

43. 1 USCMA 639, 5 CMR 67 (1952).

44. The opinion in United States v. Jordan, 21 CMR 627, 631 (AFBR 1955), *rev'd on other grounds*, 7 USCMA 452, 22 CMR 242 (1957), describes order of this type as: "Those not capable of being fully and immediately executed, but requiring certain preparatory steps, which preparatory steps are intended to be, and are capable of being, commenced immediately, and continued without material interruption until full execution has been accomplished." The preparatory steps may, in our view, require either preparation (such as, obtaining certain equipment and thereupon accomplishing a specified task) or passive preparation (such as, to be on the alert for an event that may occur momentarily, whereupon a certain specified act is to be performed).

given.[45] Thus, where a soldier was ordered to do two hours extra work, and started but did not complete his assigned task, he was not guilty of willful disobedience.[46]

A steady source of disagreement in the cases arises when a soldier, ordered to return to his unit, stops enroute at his home for a sojourn. In *United States v. Hall,*[47] the accused, pursuant to express orders, left to return to his unit. However, while enroute, he decided to spend three weeks at his home before complying fully with his orders. The soldier was found guilty of willful disobedience. On appeal, the conviction was reversed in a most unsatisfactory opinion. A dissenting judge pointed out that such behavior was willful disobedience because it involved a deliberate and intentional defiance of authority.[48]

A few years later, in *United States v. Turpin,*[49] the court was presented with a factual situation virtually indistinguishable from that presented in *Hall.* Yet the court now held that the soldier's three month sojourn at home constituted willful disobedience within the meaning of Article 90. The court quite correctly reasoned that the soldier's knowing and voluntary conduct betokened a state of mind wholly inconsistent with a good faith attempt to comply with his superior's orders.[50] In light of *Turpin, Hall's* precedential capacity, at the least, has been seriously undermined.

Negligence:

"A neglect to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of . . . [Article 90] but may be an offense under Article 92."[51] In tort law, the negligent tortfeasor is treated less severely than the wanton or willful tortfeasor. So too, in military law, negligent disobedience of orders is not as culpable as willful disobedience. Finally, in addition to the above mentioned "nesses", ineptness in the performance of a task ordered by a superior is not tantamount to willful disobedience since, by definition, it is not intentional refusal.[52]

45. United States v. Yerger, 1 CMR 569 (CGBR 1951).
46. *See also* United States v. DiFronzo, 20 CMR 408 (ABR 1955).
47. 30 CMR 550 (ABR 1961).
48. *Id.* at 554.
49. 35 CMR 539 (ABR 1964).
50. *See* discussion from United States v. Jordan, *supra,* note 43.
51. MCM (Rev. 1969) ¶ 169b.
52. *See* United States v. Harkins, 3 CMR 537 (AFBR 1952).

CONCLUSION

One only need remember the daily newspapers to recall the familiar refrains "airman refuses to bomb Cambodia," "Captain refuses to falsify reports" and "Servicemen refuse order to attack." Whether the "winding down" of our far eastern engagements, the "spiraling-up" of our future endeavors and the all volunteer "professional" military establishment will cause an increase or decrease in such occurrences is a matter of speculation. However, what is crystal clear is the past, present and future military reaction to such refrains—"serviceman prosecuted for wilfull disobedience."

It is easy for us to sit at home in peace, quiet and comfortable, and read such headlines, and reflect that the disobedient soldier is following the dictates of his conscience, and that nothing but good can come from such actions. In reality, however, such a soldier has taken a grave step.[53] Whether the reader is of a liberal, moderate, or conservative persuasion, an understanding of the military law on willful disobedience will aid in his appreciation of the issues involved.

What this exposition has sought to do is explore an aspect of Article 90, U.C.M.J. By bringing together all of the relevant elements, by capsulizing what we believe to be an increasingly important sanction against the nonobedient soldier, it was our intent to cast a little light on a small portion of what many consider to be a rather dark U.C.M.J.

53. The next few years of his life may be quite unpleasant; and the stigma of the less-than-honorable discharge may haunt him for the rest of his life. Furthermore, a soldier who willfully disobeys an order in a heated combat situation may face immediate death at the hands of his companions, all without the legal formalities of due process. *See* Rubin, *Legal Aspects of the My Lai Incident*, 49 ORE. L. REV. 260, 268 (1970).